Report of the Electronic Records Study Commission

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Recommendations for Amendments to the Arkansas Freedom of Information Act

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December 15, 2000

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Appendices

Members of the Electronic Records Study Commission

Act 1060 of 1999 provided for appointment of Commission members by constitutional officers, by relevant associations, and from the Department of Information Systems.

Governor

Jerry Rose, City Attorney
City of Fayetteville
113 W. Mountain St., Fayetteville, AR 72701
501-575-8313
jrose10587@aol.com

John J. Watkins, Professor of Law
University of Arkansas, Fayetteville, AR 72701
501-575-2456
jwatkins@comp.uark.edu

Speaker of the House

Carol Griffee, President
Editorial Services, Inc.
2610 N. Taylor St., Little Rock, AR 72207
501-666-6425
esicarol@aristotle.net

Senate President Pro Tempore

Dennis Byrd, Bureau Chief
Donrey Media
401 Victory St., Little Rock, AR 72201
501-374-0699
dbyrd@donreynews.com

Attorney General

Mac Norton, Attorney at Law
Wright, Lindsey and Jennings
200 W. Capitol Ave., Ste 2200, Little Rock, AR 72201-3699
501-371-0808
mnorton@wlj.com

Department of Information Systems

Susan Cromwell, Director
Office of Information Technology
One Capitol Mall, Little Rock, AR 72201
501-682-4302
susan.cromwell@mail.state.ar.us

Doug Elkins, Director of Operations
One Capitol Mall, Little Rock, AR 72201
501-682-5100
doug.elkins@mail.state.ar.us

Arkansas Press Association

Jeff Porter, Reporter
Arkansas Democrat-Gazette
PO Box 2221, Little Rock, AR 72203-2221
501-378-3887
jporter@ardemgaz.com

Steve Russell, Co-Publisher/Editor
Chicot County Spectator
PO Box 552, Lake Village, AR 71653-0552
870-265-2071
arccs@ipa.net

Arkansas Municipal League

The Honorable Stewart Nelson
Mayor, City of Morrilton
PO Box 583, Morrilton, AR 72110
501-354-1556
cityhall@mev.net

Association of Arkansas Counties

The Honorable Patti Hill
Crawford County Clerk
300 Main Street, Van Buren, AR 72956
501-474-1312
crwcoclk@ipa.net

Arkansas School Boards Association

Kristen C. Gould, Staff Attorney
Arkansas School Boards Association
808 Dr. Martin Luther King Jr. Drive, Little Rock, AR 72202
501-372-1415
kristen@arsba.org

Role and Scope of the Electronic Records Study Commission

The Electronic Records Study Commission was created by the passage of Act 1060 of 1999 (see Appendix A). The Commission was charged with studying public access to electronic or computerized records under the Arkansas Freedom of Information Act and developing recommendations for amendments to that Act for consideration by the 83rd General Assembly.

Overview of the Commission's Work

In the 1999 session of the General Assembly, concerns arose among legislators, municipal officials, members of the press, and others with respect to public access to electronic records under the Arkansas Freedom of Information Act (FOIA). Senate Bill 805 (see Appendix B) was introduced to address problems identified by municipal officials in responding to FOIA requests for electronic information. The Attorney General also noted in an opinion (see Appendix C) that the FOIA does not address many of the questions about the availability of information in electronic form.

Senate Bill 805 was withdrawn when it became obvious that broader legislation was advisable. The result was Act 1060. Some of the facts, circumstances and concerns identified during consideration of SB 805 and the bill that became Act 1060 were:

- An increasing number of public records are created, kept, and required to be maintained in electronic form.
- An increasing number of FOI requests seek public records in electronic form.
- Citizens of Arkansas have increasing access to the World Wide Web at home, at work, and in public places.
- Modern computer systems are becoming sufficiently standardized so as to permit greater convenience in making available public records on the World Wide Web.
- Such convenient access would tend to decrease the need for and frequency of FOIA requests.
- Access to accumulated, centralized, cross-referenced electronic information raises privacy concerns that may not exist in a paper environment.

To address these points, the General Assembly created the Commission. Attorney General Mark Pryor hosted the Commission's organizational meeting on August 27, 1999, and explained its charge. Representatives of the Department of Information Systems were named co-chairs and Patti Hill, Crawford County Clerk, was named secretary. Commission members agreed to meet monthly and to focus their initial meetings on fact-finding.

Between its first meeting and its last on December 11, 2000, the Commission held 18 meetings, during which a quorum was present each time. In September 1999, the ERSC established a World Wide Web site for posting meeting announcements and minutes and distributing research materials (see Appendix D).

Highlights of the monthly meetings included testimony from a number of individuals and discussion that focused on: accessibility of electronic records, standardization of electronic records and record-keeping systems, duty to publish electronically and the burden of costs (both in

equipment and personnel), and concerns for privacy of citizens with an eye toward balancing access and confidentiality. The Commission focused on the issues presented during the fact-finding and then developed a set of fundamental principles upon which it would frame subsequent discussions and recommendations.

After the fact-finding meetings were concluded in July 2000, the Commission began to draft amendments to the FOIA, including new definitions, recommendations for exemptions, new provisions, and modification of existing sections. There was considerable discussion about the role and scope of the Commission and whether the modifications should contemplate the use of paper records as well as electronic records. Early into the discussion of new definitions, it became apparent that it would not be prudent to establish distinct bodies of law that distinguished among media under the FOIA.

Some Commissioners expressed concern that amending the FOIA to take into account information in electronic form would have an adverse effect on personal privacy, particularly because the act does not contain a generally applicable privacy exemption. They argued that the amount of information about individual citizens in government databases alters the privacy interests implicated by disclosure of that information. As the U.S. Supreme Court has pointed out with respect to criminal histories—"rap sheets"—in FBI databases, "plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764 (1989).

However, the Commission was not of one mind on this issue; indeed, some of the discussions were rather heated. Two proposals were made, but each drew significant opposition from a substantial minority on the Commission. In the end, the Commission decided not to include a privacy provision in its proposed legislation and agreed that the issue would not be best treated in the FOIA but in a separate statute.

Included in this report are: highlights of the testimony and written feedback presented to the Commission, principles developed by the Commission, proposed amendments to the FOIA, and a section-by-section analysis of the amendments.

Summary of Commission Recommendations for Amendments to the FOIA

The Commission respectfully recommends that the General Assembly amend the FOIA in the following ways:

- To include electronic records specifically in the Act's definition of "public records."
- To establish a definition of the "custodian" of a public record, so that the responsibility for responding to an FOIA request for the record is fixed and certain, no matter where the record may reside electronically.
- To require state agencies to do what many do already--make certain basic information publicly available without request, and to require that it be available on the Internet after July 1, 2002.
- To provide specifically that FOIA requests may be made electronically, e.g., by e-mail, as well as in person or by postal mail or telephone; and to require that requests be reasonably specific.
- To avoid any risk to federal education funds by making the Act's "scholastic records" exemption consistent with the Federal Educational Rights and Privacy Act of 1974.
- To provide an exemption for information regarding security measures on government computer networks.
- To provide that citizens may copy public records, electronically and otherwise, and to establish standards for copying fees.
- To provide that a citizen may request public records in any medium or format that it can be conveniently furnished in, while also providing that a custodian is not required to create a record that does not already exist, but allowing common-sense discretion to do so when appropriate.
- To clarify for practical purposes the time limits for responding to FOIA requests.

- To clarify that exempt information should be removed from public records prior to disclosure, and to require that electronic removal of information be indicated on the electronic record produced.
- To provide that computer hardware and software acquired by public entities after July 1, 2001, not impede access to public records.

During the course of the discussions Commission members occasionally identified other points in the FOIA on which amendments might be considered. For example, the Commission was asked to consider whether the negligence standard in the Act's criminal penalty was appropriate in an electronic environment. Likewise, the Commission was also asked to consider clarification of the Act's term "public meeting" in an electronic age. However, the Commission did not believe that such other issues were within the scope of its charge Under Act 1060. Accordingly, the Commission recommends only the above amendments.

The amendments are included in this Report in bill form, followed by a more detailed section-by-section analysis of the Bill.

Summary of Testimony Heard by Electronic Records Study Commission

Electronic Records Study Commission members heard from the following speakers:

Sept. 10, 1999
Videoconference between Fayetteville and Little Rock

Little Rock City Attorney Tom Carpenter explained Senate Bill 805 (sponsored in the 1999 regular legislative session by Sen. Jim Argue), and introduced a letter highlighting his concerns to date (see Appendix E). Mr. Carpenter said his office drafted the bill in an attempt to address the problems that cities encounter regarding the release of electronic data.

Scott Huddleston, information technology manager for the City of Fayetteville, addressed the commission regarding problems his city has encountered in complying with requests for electronic records. Specifically, he spoke of compatibility and connectivity issues. He also mentioned that some information in electronic form, specifically GIS information, is only available using proprietary viewing software, which limits its readability by the requester.

Oct. 13, 1999
Videoconference between Fayetteville and Little Rock

Jeff Sikes, attorney for the Association of Arkansas Counties, explained the results of a survey questionnaire (Appendix F) geared to identify all electronic access of county records. The survey questions included:

1. What percentage of counties is fully computerized?
2. What effort is being made to help counties when they decide to computerize to comply with the FOIA?
3. Would a centralized effort help in establishing electronic filing systems?

John Gibson, assistant county administrator, and Steve Kizzar, computer systems administrator, both from Washington County, spoke about their efforts to make electronic property records available through the county assessor's office and the costs involved. This discussion generated several issues related to cost recovery, access fees (which are the same for both commercial use and citizen access), and potential inadvertent subsidization by the county of a commercial interest.

Phillip Scott of Computer Assisted Mass Appraisal Technologies spoke about his work on automation of land records in 39 Arkansas counties. Mark Wingfield of Dynamic Information Solutions, which supports 14 counties with document imaging systems, discussed access systems with user-friendly interfaces in public locations. Both said more technology training was needed in county offices.

Nov. 10, 1999
Videoconference between Fayetteville and Little Rock

Preston Means of the Department of Finance and Administration's Revenue Division explained how Freedom of Information Act (FOIA) requests for electronic records requests are handled. Older systems are housed at the Department of Information Systems, using various levels of technology. Mr. Means pointed out the difference in responsibilities between DF&A and DIS with respect to management of DF&A's data. This led to a discussion of the need for a definition of custodian in the Freedom of Information Act.

Michael Hipp, director of the Department of Information Systems, outlined issues that he is aware of regarding FOIA matters. These include indexing electronic records to allow better access, fees for copying electronic records, the ownership of electronic records and the state's use of old information systems that don't lend themselves to ad hoc FOIA requests.

Bob Russell of the state Attorney General's Office discussed FOIA requests for electronic mail, including those messages deleted by the user but not necessarily entirely deleted by computer systems. The attorney general has opined that electronic mail messages are within the definition of public record in the FOIA.

James Winningham, chief information officer for the Department of Insurance, discussed information available to the public at his agency and his concerns of protecting privacy.

Kyle King and Joseph Dowell, both of the Information Network of Arkansas, described state government information available, both free and fee-based, via the Internet. The INA was created by legislation in 1995 and now maintains the state's home page on the World-Wide-Web. The commission subsequently received a letter about the INA and its activities from Secretary of State Sharon Priest, chair of the INA board (Appendix G).

Dec. 15, 1999
Little Rock

Shelby Johnson, state land information coordinator, presented a GIS Issues Briefing (see Appendix H) and discussed electronic records kept as digital maps in geospatial information systems. He said such land information can be analyzed for statistical purposes and will become more centralized and accessible to the public. Mr. Johnson, representing the Arkansas State Land Information Board, agreed to share information between the Land Information Board and the commission.

Jim Boardman and Bobbie Davis, both with the Arkansas Department of Education, discussed the Arkansas Public School Computer Network and maintenance of electronic records relating to the public schools. Mr. Boardman said the department attempts to balance providing information to the public and protecting student confidentiality.

Feb. 17, 2000
Videoconference between Fayetteville and Little Rock

Alice Lacey, registrar of the University of Arkansas, Fayetteville, discussed FOIA issues in higher education, including resources required in response to information requests, the requirements set out by the federal Family Educational Rights and Privacy Act, and possible public relations and marketing problems.

Julie Cabe of the Arkansas Department of Higher Education described the state agency's database of students and faculty members and discussed concerns regarding privacy of both groups.

May 19, 2000
Little Rock

Melanie Bayne from the Office of Information Technology, part of the Department of Information Systems, presented a short video seminar on the subject of open architecture of data exchange on a state level. Commission members have discussed the need for uniform information technology standards for all levels of government.

Dennis Schick, executive director of the Arkansas Press Association, spoke of concerns about weakening the current FOIA and that day's newspaper articles involving FOIA issues. He then introduced APA lobbyist Milton Scott, who spoke briefly about his longtime experience submitting bills to the Legislature.

June 14, 2000
Little Rock

Mark Hudson of the Bureau of Legislative Research staff told the commission it would be more effective to offer its recommendations in bill form. The proposed bill is reproduced below.

July 20, 2000

The Commission sent a letter to various groups with FOIA interests, including all state agencies (see Appendix I) requesting input on the principles that were developed to frame the work of the Commission. Respondents are listed in Appendix J.

Principles Developed by the Commission

1. All information stored[1] in computers owned or operated by or on behalf of any agency is a "public record" as that term is used in the Arkansas Freedom of Information Act (FOIA).

2. Agencies[2] should promote public access to records in electronic form[3] when they install or upgrade computer systems and should ensure that all records are maintained in a form that can be accessed through available technology. When possible, agencies should neither develop nor buy software that requires proprietary viewers to access and should seek opportunities to facilitate public access to records when, in the ordinary course of business, new software acquisition decisions are made.

3. Agencies should be knowledgeable about records they keep and should maintain standards of accuracy and security as well as processes to distinguish confidential records from those that are open to disclosure.

4. Agencies using electronic records should make nonexempt electronic information[4] available to the public through read-only interfaces via computers in public locations, electronic reading rooms, and on the Internet.

5. Agencies using electronic records should make available:

    a. a description of the types of information stored in computers

    b. instructions on how to access information that is available to the public

    c. internal policies and procedures for responding to FOIA requests.

6. Electronic information not specifically exempted by statute should not be withheld on the grounds that it is mixed with exempt information. Agencies should have in place appropriate practices for efficiently redacting exempt information. Efficient redaction should include an indication within the record of the location(s) and volume of redacted material.

7. Individual privacy issues may need to be reconsidered and re-balanced against public access in light of emerging technologies.

8. Custodians[5] should release electronic information in the form requested when they are capable of doing so, with presently available resources, without undue effort or expense, provided the request reasonably describes the records. (Producing a printed document from computer data, copying that information onto a magnetic tape, or manipulating data in electronic form is not necessarily "creating a record" in the sense that the term is applied to paper records). Agencies should have management procedures in place to ensure that encryption is appropriately used so that records can be made available in a non-encrypted form in responding to an FOIA request.

9. Costs of government documents should not be a barrier to access, regardless of whether government records are available from private information providers. Thus:

    a. The public should only be charged the actual cost, verifiable and itemized, of reproducing or otherwise providing electronic information.

b. Actual cost should not exceed the incremental cost of providing the data, which does not include the cost of creating or maintaining information systems for purposes relating to the agency mission.

c. Agencies may elect to provide access at reduced or no charge, and should do so whenever appropriate.

10. Time limits for responding to an FOIA request should be equivalent for paper and electronic records. However, time limits for responding to requests for electronic records may be extended if the request calls for presentation of data in a form not presently maintained by the agency. Custodians should certify the reason for the extension in writing and provide an anticipated date for compliance with the request.

Notes

1. **Stored records** - records, other than routine system backup records, kept by agencies on computer facilities.

2. **Agencies** - state and local governments and any other entities subject to the FOIA.

3. **Records in electronic form** - This definition of record (as distinct from "public records" included in the FOIA) is intended to mean the most discreet identifiable piece of electronic information retained by agencies (See definition of Electronic Information below).

4. **Electronic Information**

- **Database -** a database is a shared collection of logically related data designed to meet the information needs of multiple users. A database is the computer program that allows the data to be organized, updated, and accessed in a number of different ways.

- **File -** in data processing, using an office metaphor, a file is a related collection of records.

- **Record -** in computer data processing, a record is a collection of data items arranged for processing by a computer program. Multiple records are contained in a file or data set. The organization of data in the record is usually prescribed by the programming language that defines the record's organization and/or by the application that processes it. Each record would consist of fields for individual data items.

- **Field -** a field is a placeholder or container for a single piece and type of data. By providing the same information in the same fields in each records so that all records are consistent), files will be easily accessible for analysis and manipulation by a computer program.

    - **Metadata -** metadata describes the information about fields of a record, such as its structure, format, relationship to other data, date of creation, custodian responsible for updates, level of confidentiality, etc.

- **Data -** data is information that has been translated into a form that is more convenient to store, move or process. Specific to computer and transmission terms, data is information converted into binary or digital form.

5. **Data Custodians** are responsible to:

- Judge the value of information and classify it;
- Specify controls and communicate the control requirements to the service provider and users of the information;
- **Service providers** are responsible for the processing and storage of the information as security agents (for example, ISPs who host data storage). They are distinguished from custodian in that they do not have responsibility for maintenance of the data or accuracy of the data but must provide physical and procedural safeguards to access.

Summary of Feedback on the Principles

There were 42 respondents from this study. Of those respondents, 16 surveys (38%) submitted only general comments, not commenting on any of the ten principles. Whereas, 10 surveys (24%) commented on three or fewer principles and 16 surveys (38%) commented on four or more of the principles asked. An alphabetized listing of respondents is attached in Appendix J, along with the comments by each agency.

How this study was analyzed

A content analysis of the 42 surveys was conducted. The surveys were read and coded for themes. Many of the same themes appeared throughout the entire survey, such as resource implications and language of the principle. Those that did not fit into any tidy category were lumped together as 'other.'

General Comments

Many of the surveys agreed and praised the ERSC's efforts in bringing agency changes to the FOIA. This theme received the largest amount of responses, 19 in all, among the twelve categories. One agency commented, "Looks very good and promising overall."

Resource issues occupied two separate categories. Many more were concerned about personnel issues (9 responses) than other resource issues such as training, funding and costs (7 responses). Security issues concerned six of the respondents, as did privacy issues. As mentioned earlier, some surveys, six total, responded that the principles did not apply to their agency. Many agencies responding, five altogether, indicated their agency was already complying with many of the principles or plans for compliance are scheduled. Four surveys questioned FOIA intent, indicating implications other than reading and viewing public records, such as for marketing purposes. Many surveys, seven total, responded with agency interpretations of existing exemptions to the FOIA as it pertains specifically to their agency.

The Commission's Proposed Amendments to the FOIA in Bill Form

State of Arkansas
83rd General Assembly A Bill
Regular Session, 2001 _____ Bill ___
By: _____

For An Act To Be Entitled

"AN ACT TO AMEND CHAPTER 25, TITLE 19 OF THE ARKANSAS CODE TO ENSURE PUBLIC ACCESS TO RECORDS MAINTAINED IN ELECTRONIC FORM; TO EXEMPT FROM DISCLOSURE COMPUTER SECURITY INFORMATION; TO ALLOW CITIZENS TO REQUEST COPIES OF PUBLIC RECORDS; TO PROVIDE FOR COPYING FEES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 25-19-103 is amended to read as follows:

25-19-103. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Public records" means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any ~~form~~ medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records. Software acquired by purchase, lease, or license is not a public record within the meaning of this subdivision.

(2) "Public meetings" means the meetings of any bureau, commission, or agency of the state, or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds.

(3) "Custodian," with respect to any public record, means the person having administrative control of that record, or his or her designee. However, custodian does not mean a person who holds public records solely for purposes of storage, safekeeping, or data processing for others.

(4) "Medium" means the physical form or material in or on which records and information may be stored or represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes.

(5) "Format" means the organization, arrangement, and form of electronic information for use, viewing, or storage.

SECTION 2. Arkansas Code § 25-19-104 is amended to read as follows:

25-19-104. ~~Penalty.~~ Information for public guidance.

~~Any person who negligently violates any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars ($200) or thirty (30) days in jail, or both, or a sentence of appropriate public service or education, or both.~~

(a) Each state agency, board, and commission shall prepare and make available for the guidance of the public:

(1) A description of its organization, including central and field offices, the general course and method of its operations, and the established locations (including, but not limited to, telephone numbers, and street, mailing, electronic mail, and internet addresses) at which, and the methods whereby, the public may obtain access to public records;

(2) A list and general description of its records, including computer databases;

(3) Its regulations, rules of procedure, any formally proposed changes thereto, and all other written statements of policy or interpretations formulated, adopted, or used by the agency, board, or commission in the discharge of its functions;

(4) All opinions and decisions issued and orders made in the adjudication of matters; and

(5) Copies of all records, regardless of medium or format, released under Section 25-19-105 which, because of the nature of their subject matter, the agency, board, or commission determines have become or are likely to become the subject of frequent requests for substantially the same records.

(b) All materials made available by a state agency, board, or commission, pursuant to subdivision (a) of this section and created after July 1, 2002, shall be made publicly accessible, without charge, in electronic form via the Internet. It shall be a sufficient response to a request to inspect or copy such materials that they are available on the Internet at a specified location, unless the requester specifies another medium or format under Section 25-19-105(d)(3)(B).

SECTION 3. Arkansas Code § 25-19-105 is amended to read as follows:

25-19-105. Examination and copying of public records.

(a)(1) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.

(2) A citizen may make a request to the custodian to inspect, copy, or receive copies of public records. The request may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian. The request must be sufficiently specific to enable the custodian to locate the records with reasonable effort. If the request is made in person or by telephone, the custodian may require the request to be in writing.

(3) If the person to whom the request is directed is not the custodian of the records, such person shall so notify the requester and identify the custodian, if known to or readily ascertainable by such person.

(b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:

(1) State income tax records;

(2) Medical records; ~~, scholastic records, and~~ adoption records; and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act;

(3) The site files and records maintained by the Arkansas Historic Preservation Program and the Arkansas Archeological Survey;

(4) Grand jury minutes;

(5) Unpublished drafts of judicial or quasijudicial opinions and decisions;

(6) Undisclosed investigations by law enforcement agencies of suspected criminal activity;

(7) Unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General;

(8) Documents which are protected from disclosure by order or rule of court;

(9)(A) Files which, if disclosed, would give advantage to competitors or bidders; and

(B)(i) Records maintained by the Arkansas Economic Development Commission related to any business entity's planning, site location, expansion, operations, or product development and marketing, unless approval for release of such records is granted by the business entity.

(ii) Provided, however, this exemption shall not be applicable to any records of expenditures or grants made or administered by the Arkansas Economic Development Commission and otherwise disclosable under the provisions of this chapter;

~~(10) Personnel records to the extent that disclosure would constitute clearly unwarranted invasion of personal privacy; and~~

(~~11~~10)(A) The identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers.

(B) Records of the number of undercover officers and agency lists are not exempt from this chapter~~.~~;

(11) Records containing measures, procedures, instructions or related data used to cause a computer or a computer system or network, including telecommunication networks, or applications thereon, to perform security functions, including, but not limited to, passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing access to computers, computer systems or networks, or any data residing therein; and

(12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.

(c)(1) ~~However,~~ Notwithstanding subdivision (b)(12), all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.

(2) Any personnel or evaluation records exempt from disclosure under this chapter shall nonetheless be made available to the person about whom the records are maintained or to that person's designated representative.

(3)(A) Upon receiving a request for the examination or copying of personnel or evaluation records, the custodian of the records shall determine within twenty-four (24) hours of the receipt of the request whether the records are exempt from disclosure and make efforts to the fullest extent possible to notify the person making the request and the subject of the records of that decision.

(B) If the subject of the records cannot be contacted in person or by telephone within the twenty-four-hour period, the custodian shall send written notice via overnight mail to the subject of the records at his last known address. Either the custodian, requester, or the subject of the records may immediately seek an opinion from the Attorney General, who, within three (3) working days of receipt of the request, shall issue an opinion stating whether the decision is consistent with this chapter. In the event of a review by the Attorney General, the custodian shall not disclose the records until the Attorney General has issued his opinion.

(C) However, nothing in this subsection (c) shall be construed to prevent the requester or the subject of the records from seeking judicial review of the custodian's decision or the decision of the Attorney General.

(d)(1) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy those records shall not be denied to any citizen.

(2) A citizen shall be permitted to copy public records with his or her own equipment. However, such copying shall not damage the record in any way, shall take place only when the record is in the control of the custodian, and shall be subject to the custodian's supervision. With respect to electronic records, the custodian shall take steps necessary to maintain the security and integrity of the records and the computer system.

(3)(A) Upon request and payment of a fee as provided in paragraph (4), the custodian shall furnish copies of public records if he or she has the necessary duplicating equipment.

(B) A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software.

(C) A custodian is not required to compile information or create a record in response to a request made under this section. However, a custodian, at his or her discretion, may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide such data in an electronic format to which it is not readily convertible. Where the cost and time involved in complying with such requests are relatively minimal, custodians should agree to provide the data as requested.

(4)(A) Except as provided in subparagraph (B) or by statute, any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance but not including personnel time associated with searching for, retrieving, reviewing, or copying the records. The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means. If the estimated fee exceeds $25.00, the custodian may require the requester to pay that fee in advance. Copies may be furnished without charge or at a reduced charge when the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.

(B) If the custodian agrees to a request under paragraph (3) (C) , he or she may charge the actual, verifiable costs of personnel time exceeding two hours associated with such tasks. The charge for personnel time shall not exceed the salary of the lowest paid employee who, in the discretion of the custodian, has the necessary skill and training to respond to the request.

(C) The custodian shall provide an itemized breakdown of charges under paragraphs (A) and (B).

~~(e) If a public record is in active use or storage and, therefore, not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a~~

~~date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter.~~

(e)(1)Each request for access to public records shall be complied with immediately if possible, but in no event later than the end of the third working day following the date the request is received by the custodian. If access to the requested records is not provided immediately, the custodian shall promptly specify in writing the time and date within the three-working-day period that a response to the request will be made. Failure of the custodian to respond within three working days shall be considered a denial of the request unless the response time is extended pursuant to paragraph (2).

(2)The time limit prescribed in paragraph (1) may be extended up to five additional working days if the custodian certifies in writing that:

(A) The request requires the collection of voluminous records;

(B) The request requires an extensive search;

(C) The requested records have not been located in the course of routine search and further efforts are being made to locate them;

(D) The requested records must be examined and evaluated by persons having the necessary competence and discretion to determine if they are exempt from disclosure or should be revealed only with appropriate deletions; or

(E) The request requires substantial deletion of exempt information.

(3) When the response time is extended pursuant to paragraph (2), the custodian shall promptly give written notice to the citizen making the request prior to expiration of the time period specified by paragraph (2), indicate the reason(s) that additional response time is necessary, and state the time and date that a response to the request will be made. Failure of the custodian to respond within the extended time period shall be considered a denial of the request.

(f) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information. Any reasonably segregable portion of a record shall be provided after deletion of the exempt information. The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where such deletion was made. If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, or obtain copies of public records, the custodian shall bear the cost of such separation.

(g) Any computer hardware or software acquired by an entity subject to Section 25-19-103 after July 1, 2001, shall permit full compliance with the requirements of this section and shall not impede public access to records in electronic form.

~~(f)~~(h) Notwithstanding any Arkansas law to the contrary, at the conclusion of any investigation conducted by a state agency in pursuit of civil penalties against the subject of the investigation, any settlement agreement entered into by a state agency shall be deemed a public document for the purposes of this chapter. However, the provisions of this subsection shall not apply to any investigation or settlement agreement involving any state tax covered by the Arkansas Tax Procedure Act, § 26-18-101 et seq.

SECTION 4. Arkansas Code Title 25, Chapter 19 is amended by adding the following new section to be numbered 25-19-108:

25-19-108. Penalty.

Any person who negligently violates any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars ($200) or thirty (30) days in jail, or both, or a sentence of appropriate public service or education, or both.

SECTION 5. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 7. All laws and parts of laws in conflict with this act are hereby repealed.

SECTION 8. EMERGENCY CLAUSE. It is hereby found and determined by the Eighty-third General Assembly that confusion exists as to the status of electronic records under the Freedom of Information Act of 1967, as amended; that the right to obtain copies of public records at a reasonable cost is uncertain; that access to certain electronic records may adversely affect the security of computer systems and networks maintained by public entities; and that access to certain student records maintained in electronic form by school districts, institutions of higher education, and state agencies may jeopardize federal funding. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.

Section-by-Section Analysis for the Proposed Bill

SECTION 1.

This section of the bill amends the definition provisions of the FOIA, Ark. Code Ann. § 25-19-103. Revised subdivision (1) reads as follows:

> *(1) "Public records" means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records. Software acquired by purchase, lease, or license is not a public record within the meaning of this subdivision.*

The phrase "electronic or computer-based information" in the first sentence is new. Technically, this language is unnecessary, since the definition of "public record" has for many years included the expansive phrase "or data compilations in any form." *See, e.g.,* Ark. Op. Att'y Gen. No. 99-018 (FOIA applies to electronic mail). Nonetheless, the Commission believes that a specific reference to electronic information is advisable to emphasize that the act reaches records maintained in this medium.[1] The phrase "data compilations in any form" is changed to "data compilations in any *medium*," a term defined in new subdivision (4).

The new last sentence excludes from the definition of public record any software "acquired by purchase, lease, or license." This provision is necessary to protect proprietary data and ensure that government agencies and other entities subject to the FOIA can easily obtain software necessary to carry out their functions.

Section 1 of the bill also adds three new definitions to Section 25-19-103: custodian, medium, and format. The new provisions are as follows:

> *(3) "Custodian," with respect to any public record, means the person having administrative control of that record, or his or her designee. However, custodian does not mean a person who holds public records solely for purposes of storage, safekeeping, or data processing for others.*
> *(4) "Medium" means the physical form or material in or on which records and information may be stored or represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes.*
> *(5) "Format" means the organization, arrangement, and form of electronic information for use, viewing, or storage.*

[1] Congress reached the same conclusion in 1996 when it amended the federal Freedom of Information Act. *See* 5 U.S.C. § 552(f)(2).

The term "custodian" appears at various places in the FOIA but has not been defined. The definition in subdivision (3) is couched in terms of a person who has "administrative control" of a public record. This approach is consistent with Arkansas Supreme Court decisions indicating that records not physically located at an agency but within its administrative control are subject to the FOIA. *See Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995). The exclusion in the second sentence includes, for example, the Department of Information Systems, which stores and processes electronic information for many other state agencies. Under this provision, DIS would not be a custodian of this data for FOIA purposes, and a citizen requesting the records would seek access to them from the agency for whom DIS performs data management services.

Subdivision (4), which defines "medium" in broad terms, is based on a definition in the Kentucky public records act.[2] While the definition of "medium" refers to the physical form or material in or on which records and information may be maintained, the term "format" in subdivision (5) is intended to include both the technical and informal usage of the term. For example, the term is often used informally to mean conversion of data from one word processing program to another, or to mean the rearrangement of the display of data on a spreadsheet. A more technical use of the term format would refer to the definition of the data structure used by various programs.

SECTION 2.

The purpose of this section is to require state agencies, boards, and commissions to prepare certain information and make it available – in written form and on the Internet – for guidance of the public. These requirements would appear in Section 25-19-104, which presently provides for criminal penalties. That provision would be shifted, without change, to new Section 25-19-108.

New Section 25-19-104 has two components. Subdivision (a) imposes an affirmative obligation to prepare and make available certain information. It provides:

> *(a) Each state agency, board, and commission shall prepare and make available for the guidance of the public:*
> *(1) A description of its organization, including central and field offices, the general course and method of its operations, and the established locations (including, but not limited to, telephone numbers, and street, mailing, electronic mail, and internet addresses) at which, and the methods whereby, the public may obtain access to public records;*
> *(2) A list and general description of its records, including computer databases;*
> *(3) Its regulations, rules of procedure, any formally proposed changes thereto, and all other written statements of policy or interpretations formulated, adopted, or used by the agency, board, or commission in the discharge of its functions;*
> *(4) All opinions and decisions issued and orders made in the adjudication of matters; and*
> *(5) Copies of all records, regardless of medium or format, released under Section 25-19-105 which, because of the nature of their subject matter, the agency, board, or commission*

[2] *See* Ky. Rev. Stat. § 61.870(7).

determines have become or are likely to become the subject of frequent requests for substantially the same records.

Similar requirements appear in the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-203, but the bill goes further in some respects. First, subdivision (a) applies to all state agencies, boards, and commissions, some of which are not covered by the Administrative Procedure Act. Second, paragraph (2) requires these entities to prepare "[a] list and general description of its records, including computer databases."[3] Such a list will make it easier for citizens to access public records. The Commission expressly rejected as too burdensome a requirement that more detailed indices be maintained. Third, paragraph (5) mandates compilation of all records that have been released pursuant to a request under the FOIA and are likely to be the subject of future requests. Congress added a similar requirement to the federal Freedom of Information Act in 1996.[4] Paragraph (5) expands the affirmative obligation of agencies, boards, and commissions to make information available to the public without the need for a request pursuant to Section 25-19-105.

Like paragraph (5), subdivision (b) is based on a 1996 amendment to the federal FOI statute.[5] Subdivision (b) provides:

(b) All materials made available by a state agency, board, or commission, pursuant to subdivision (a) of this section and created after July 1, 2002, shall be made publicly accessible, without charge, in electronic form via the Internet. It shall be a sufficient response to a request to inspect or copy such materials that they are available on the Internet at a specified location, unless the requester specifies another medium or format under Section 25-19-105(d)(3)(B).

The corresponding federal provision has led to the establishment of "electronic reading rooms" in which anyone may use the Internet to browse federal records of the type covered by subdivision (a). Many Arkansas agencies, boards, and commissions already make available information on the Internet that can easily be accessed through the state's "home page" maintained by the Information Network of Arkansas. Taken together, subdivisions (a) and (b) should reduce the burden of agencies, boards, and commissions in responding to FOIA requests. If a requested record is available on the Internet, the custodian may simply advise the requester of that fact. This response is sufficient unless the requester wishes to obtain a copy of the record in another medium.

The Commission considered extending the requirements of new Section 25-19-104 to all entities subject to the FOIA but decided not to recommend this step because small cities, counties, and school districts would have difficulty complying at the present time.

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[3] Other states have adopted this requirement. *See, e.g.,* N.C. Stat. Ann. § 132-6.1(b).

[4] 5 U.S.C. § 552(a)(2)(D).

[5] *Id.* § 552(a)(2).

SECTION 3.

This section of the bill significantly revises Section 25-19-105 of the FOIA, which governs inspection and copying of public records.

Subdivision (a) of Section 25-19-105 is amended to read as follows:

(a)(1) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.
(2) A citizen may make a request to the custodian to inspect, copy, or receive copies of public records. The request may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian. The request must be sufficiently specific to enable the custodian to locate the records with reasonable effort. If the request is made in person or by telephone, the custodian may require the request to be in writing.
(3) If the person to whom the request is directed is not the custodian of the records, such person shall so notify the requester and identify the custodian, if known to or readily ascertainable by such person.

The first paragraph is the text of current subdivision (a), without change. Paragraphs (2) and (3) are new. Paragraph (2) provides that a citizen may not only ask to inspect and copy public records, as is the case under present law, but also make a request to "receive copies" of such records. The ability to obtain copies is necessary if access to records in electronic form is to be meaningful. Moreover, citizens seeking access to documents no longer have to rely on their own copying equipment to make copies. Construing the current law, the Attorney General has consistently opined that there is no obligation on the part of an agency to furnish copies or make available copying equipment. *See, e.g.*, Ark. Op. Att'y Gen. Nos. 95-031, 94-282, 92-289. Fees for copies are addressed in subdivision (d), which is discussed below.

Under present law, an agency is apparently required to respond only to a request made in person. *See* Ark. Op. Att'y Gen. Nos. 92-289, 88-161. Paragraph (2) expands a requester's options in this regard. Allowing e-mail requests is particularly helpful in facilitating access to electronic records, which in many cases can be sent to the requester by return e-mail. The phrase "other electronic means" makes clear that custodians are not limited to e-mail and may, for example, allow FOIA requests to be submitted via the Internet if the custodian has created an on-line form for that purpose.

Although the Attorney General has suggested that an FOIA request must be specific enough to enable the custodian to find the records being sought, *see* Ark. Op. Att'y Gen. No. 90-261, the act does not expressly address the issue. The Commission believes that a reasonable specificity requirement is warranted. This does not mean, however, that the requester must explain why he or she seeks access or describe with precision the records sought. *See* Ark. Op. Att'y Gen. Nos. 96-354, 92-289.

Finally, paragraph (2) provides that if the FOIA request is made in person or by telephone, the custodian may require that it be in writing. A written request is desirable because it documents the fact that a request was made and describes the records to which access was sought; however, the Attorney General has opined that an agency policy requiring that requests be made in writing is "probably contrary" to current law. Ark. Op. Att'y Gen. No. 96-354. The new sentence expressly authorizes custodians to require a written request, but nothing prohibits them from responding to oral requests if they so choose.

Under paragraph (3), a person who receives a misdirected FOIA request must notify the requester and identify the proper custodian, if the custodian is "known to or readily ascertainable by" the person receiving the request. Similar provisions are found in the FOI laws of other states.[6]

Subdivision (b) of Section 25-19-105 is amended by adding a new exemption for records containing security information used in computer systems and networks. Also, the exemption for scholastic records has been clarified, and the exemptions for personnel records and undercover police officers relocated without change.

Paragraph (2) of subdivision (b), in which the exemption for scholastic records appears, has been revised to read as follows:

> *(2) Medical records; adoption records; and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act;*

The change in terminology from "scholastic records" to "education records" addresses an issue identified by education professionals in comments to the Commission. The federal Family Educational Rights and Privacy Act, commonly known as "the Buckley Amendment" or "FERPA," provides for confidentiality with respect to certain information concerning students, including "education records" and "personally identifiable information," without the student's consent. FERPA applies to all educational institutions receiving federal funds, and the penalty for noncompliance can be termination of those funds.[7] Moreover, while FERPA itself does not provide for a judicial remedy, a person aggrieved by disclosure of education records may bring an action for damages or injunctive relief under a federal civil rights statute if the defendant has acted under color of state law.[8]

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[6] *See, e.g.*, Kan. Stat. Ann. § 45-218(c); Ky. Rev. Stat. § 61.872(4).

[7] 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.67.

[8] 42 U.S.C. § 1983. *See Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Fay v. South Colonie Central School Dist.*, 802 F.2d 21 (2d Cir. 1986); *Norwood v. Slammons*, 788 F. Supp. 1020 (W.D. Ark. 1991). Section 1983 permits suits against individuals as well as school districts and other political subdivisions, but not suits against the state. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

In testimony before the Commission, representatives of higher education and K-12 expressed concern that the term "scholastic records" in paragraph (2) may not be equivalent to "education records" or "personally identifiable information" as those terms are understood under FERPA, with the result that federal funding could be placed in jeopardy by FOIA requests under the Arkansas Supreme Court's decision in *Troutt Brothers, Inc. v. Emison*, 311 Ark. 27, 841 S.W.2d 604 (1992). In that case the Court essentially held that loss of federal funding is no excuse for failure to comply with the FOIA. As educational institutions move more and more student information into electronic media, this risk was felt to be increasing because, for example, social security numbers are used as student identification numbers in computer databases.

Opinions may differ about the potential for inconsistency between the FOIA and FERPA.[9] There is no doubt, however, that the funding consequences of an inability to comply with FERPA could be very serious. Also, there is no reason to invite litigation that could lead to the imposition of damages. To remove any uncertainty about the status of FERPA-protected records under the FOIA, the bill deletes the term "scholastic records" in paragraph (2) and replaces it with an exemption for "education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act."

New paragraph (11) of subdivision (b) provides as follows:

> *(11) Records containing measures, procedures, instructions or related data used to cause a computer or a computer system or network, including telecommunication networks, or applications thereon, to perform security functions, including, but not limited to, passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing access to computers, computer systems or networks, or any data residing therein;*

This provision addresses a problem pointed out by the Department of Information Systerms regarding security-related information in government computer systems and networks. In short, security information in public records is potentially available under the FOIA. It is likely that transactional information, including credit card numbers, would often be available as well. The opportunity for mischief is obvious and would be eliminated by the proposed amendment, which exempts records containing security information, i.e., passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing unauthorized access. While it could be argued that some or all of this information does not constitute a record of official performance or lack thereof, and thus not be subject to disclosure, the proposed amendment provides needed certainty in this regard.

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[9] The only Arkansas Supreme Court decision on point suggests that the term "scholastic records" is narrower than FERPA's definition of "education records." *See Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981). The Attorney General has recognized that a narrow definition of the term "scholastic records" in the FOIA may lead to disclosure of "education records" in violation of FERPA and thus jeopardize the federal funds that Arkansas receives for education. Ark. Op. Att'y Gen. No. 96-044. In the same opinion, the Attorney General invited the General Assembly to clarify the FOIA on this point.

The personnel records exemption in paragraph (10) has been redesignated as paragraph (12), the last paragraph of subdivision (b). There it is in logical proximity to subdivision (c)(1), which establishes a different standard for disclosure of particular personnel records, i.e., "employee evaluation and job performance records." These provisions were part of the same paragraph when enacted (Act 49 of 1987) but were separated when codified and separated further when additional exemptions were subsequently added to subdivision (b). The exemption in paragraph (11) protecting the identities of undercover police officers has been redesignated as paragraph (10).

Significant new provisions have been added to subdivision (d). Consistent with the proposed change in subdivision (a) that gives citizens the right to "receive copies" of records, subdivision (d) requires custodians to furnish copies of public upon request and payment of a copying fee that may not exceed the actual cost of reproduction. The fee provisions, which appear in new paragraph (4) of subdivision (d), are discussed *infra*. Paragraphs (1)-(3) provide as follows:

> *(1) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy those records shall not be denied to any citizen.*
> *(2) A citizen shall be permitted to copy public records with his or her own equipment. However, such copying shall not damage the record in any way, shall take place only when the record is in the control of the custodian, and shall be subject to the custodian's supervision. With respect to electronic records, the custodian shall take steps necessary to maintain the security and integrity of the records and the computer system.*
> *(3)(A) Upon request and payment of a fee as provided in paragraph (4), the custodian shall furnish copies of public records if he or she has the necessary duplicating equipment.*
> *(B) A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software.*
> *(C) A custodian is not required to compile information or create a record in response to a request made under this section. However, a custodian, at his or her discretion, may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide such data in an electronic format to which it is not readily convertible. Where the cost and time involved in complying with such requests are relatively minimal, custodians should agree to provide the data as requested.*

At present, subdivision (d) consists of the language that is set out in paragraph (1). The other paragraphs are new. As noted previously, the FOIA does not require an agency to furnish copies of public records. However, copying by agencies is routine in responding to FOIA responses. Paragraphs (2) and (3) recognize this common practice, with new provisions directed toward unique characteristics of electronic records. As under present law, citizens may also use their own copying equipment to duplicate public records under the supervision of the custodian, who has an obligation to maintain the security of public records. *See* Ark. Att'y Gen. Op. Nos. 99-218, 95-355.

The last sentence of paragraph (2) directs the custodian specifically to protect electronic records because of their greater vulnerability to alteration or damage in the copying process. For example, the custodian may choose to copy information on a diskette, without charge, if

connecting a citizen's computer directly to the custodian's computer or network would create a security risk.

Paragraph (3)(A) simply expresses in the act the frequent practice of responding to FOIA requests by providing copies of records with a fee for duplicating cost. Upon the requester's payment of the fee, the custodian "shall furnish copies of public records if he or she has the necessary duplicating equipment." As under present law, a custodian is not required to acquire such equipment. *See Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987).

Paragraph (3)(B) requires the custodian to provide the record in the medium specified by the requester. Based on a provision in the federal FOI act,[10] this requirement reflects the position taken by the Attorney General. *See* Ark. Op. Att'y Gen. Nos. 97-030, 95-031. If, for example, a particular record is available both as a "hard copy" and in electronic form, the requester may specify either medium. With respect to electronic records, paragraph (3)(B) provides that a citizen may specify "any electronic format to which it is readily convertible with the custodian's existing software."

An electronic record may exist in several media, such as a computer's hard drive, a "floppy" disk, or a CD. Likewise, it may exist in more than one format, such as in Word or WordPerfect, HTML or PDF, or as a spreadsheet. In many cases, it is relatively easy and cost-free to transfer an electronic record from one medium to another or to convert it from one common format to another. Indeed, with scanning equipment, it is relatively simple to convert paper records to electronic form. This versatility can facilitate access to public records and increase public convenience in their use. However, agencies have limited resources and responding to FOIA requests is typically not the responding authority's primary mission, nor have agencies been required to "create" a paper record in response to a request. *See* Ark. Op. Att'y Gen. No. 2000-218, 98-202. In other words, the user convenience opportunities of electronic records can only be taken so far without unduly imposing upon agencies' time and manpower.

Seeking to balance these competing considerations, the Commission first developed Principle Eight, which states in pertinent part: "Custodians should release electronic information in the form requested when they are capable of doing so, with presently available resources, without undue effort or expense, provided the request reasonably describes the records." By way of example, the principle suggests that printing out computer data, copying the data onto another medium, or manipulating the data does not necessarily "create" a new record as that term has been understood in the paper world. *See generally* Brooks, *Adventures in Cyberspace: Computer Technology and the Arkansas Freedom of Information Act*, 17 UALR L.J. 417, 427-31 (1995).

For instance, downloading electronic data to a disk is not materially different from making a photocopy of paper records. Both are duplication processes. Converting an electronic document from one common word processing program to another is likewise a largely automatic process, usually no more troublesome than copying a legal-sized original onto 8½ x 11 paper with a modern photocopier. In the same vein, rearranging spreadsheet data or querying a database for a particular selection of accessible information are primarily ministerial tasks. When appropriate

[10] 5 U.S.C. § 552(a)(3)(B).

hardware and software are in place and relevant personnel are available, it would not seem to be an undue FOIA burden for an agency to respond to such requests.

By contrast, significantly greater customization of electronic records is often possible, but only with substantial effort. Whether that effort is undue could vary widely among entities subject to the FOIA, depending not only upon equipment and personnel, but also upon how data is maintained for its efficient use in the agency's principal mission. In short, what is possible is not always practical. Therefore, paragraph (3)(C) authorizes, but does not require, custodians of electronic public records to go beyond the more mundane conversions required by paragraph (3)(B) when doing so is practical and without significant cost in public resources. In cases where the cost is small, custodians should provide information in the form or arrangement that the citizen requests.

Paragraph (4) deals with copying fees, a matter not presently addressed by the FOIA. It provides as follows:

> *(4)(A) Except as provided in subparagraph (B) or by statute, any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance but not including personnel time associated with searching for, retrieving, reviewing, or copying the records. The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means. If the estimated fee exceeds $25.00, the custodian may require the requester to pay that fee in advance. Copies may be furnished without charge or at a reduced charge when the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.*
> *(B) If the custodian agrees to a request under paragraph (3) (C) , he or she may charge the actual, verifiable costs of personnel time exceeding two hours associated with such tasks. The charge for personnel time shall not exceed the salary of the lowest paid employee who, in the discretion of the custodian, has the necessary skill and training to respond to the request.*
> *(C) The custodian shall provide an itemized breakdown of charges under paragraphs (A) and (B).*

Paragraph (4)(A) reflects the position taken by the Attorney General, i.e., unless a statute provides otherwise, copying fees may not exceed the actual cost of duplication and may not include time spent by employees in searching for the requested records. *See* Ark. Op. Att'y Gen. Nos. 99-133, 96-259, 90-095. The new paragraph also specifies that the custodian may not charge for personnel time associated with copying the records or reviewing them to determine whether they contain exempt information. In addition, the custodian may charge for mailing the records or otherwise transmitting them to the requester, require advance payment if the estimated fees exceed $25, and may waive or reduce the fees in the public interest if the requester's purpose in obtaining the records is primarily noncommercial.

Paragraph (4)(B) addresses fees associated with non-standard requests for electronic records under paragraph (3)(C), which authorizes – but does not require – custodians to "summarize, compile, or tailor electronic data in a particular manner or medium" and to provide such data in "an electronic format to which it is not readily convertible." In addition to the cost

recovery allowed by paragraph (4)(A), the custodian may recover the cost of personnel time in excess of two hours. The purpose of this provision is to encourage custodians to respond to requests made pursuant to paragraph (3)(C) without an undue impact on public resources.

Under paragraph (4)(C), the custodian must provide an "itemized breakdown" of any fees charged. This requirement should protect requesters as well as custodians, who must be able to justify their fees if challenged. *See* Ark. Op. Att'y Gen. No. 99-133.

Subdivision (e) of the present law appears to contemplate immediate access to public records unless they are in actual use or storage, in which case they must be made available within three working days. As the Attorney General has recognized, however, there are many instances in which neither immediate access nor access within three working days is possible. For example, a search for a "voluminous amount" of records may take some time, or the custodian may need "to review the records (perhaps in consultation with legal counsel) in order to determine if there is any exempt information contained therein which must be excised prior to disclosure." In these and other circumstances, the custodian "should . . . be afforded a reasonable time in order to comply with an FOIA request." Ark. Op. Att'y Gen. No. 94-225.

Revised subdivision (e) is an effort to codify the Attorney General's approach. It provides as follows:

> *(e)(1)Each request for access to public records shall be complied with immediately if possible, but in no event later than the end of the third working day following the date the request is received by the custodian. If access to the requested records is not provided immediately, the custodian shall promptly specify in writing the time and date within the three-working-day period that a response to the request will be made. Failure of the custodian to respond within three working days shall be considered a denial of the request unless the response time is extended pursuant to paragraph (2).*
> *(2)The time limit prescribed in paragraph (1) may be extended up to five additional working days if the custodian certifies in writing that:*
> *(A) The request requires the collection of voluminous records;*
> *(B) The request requires an extensive search;*
> *(C) The requested records have not been located in the course of routine search and further efforts are being made to locate them;*
> *(D) The requested records must be examined and evaluated by persons having the necessary competence and discretion to determine if they are exempt from disclosure or should be revealed only with appropriate deletions; or*
> *(E) The request requires substantial deletion of exempt information.*
> *(3) When the response time is extended pursuant to paragraph (2), the custodian shall promptly give written notice to the citizen making the request prior to expiration of the time period specified by paragraph (2), indicate the reason(s) that additional response time is necessary, and state the time and date that a response to the request will be made. Failure of the custodian to respond within the extended time period shall be considered a denial of the request.*

Paragraph (1) directs the custodian to comply immediately with the request, if possible, but in any event within three working days. Under paragraph (2), the response time may be extended for up to five additional working days if the custodian certifies that one or more of the listed conditions are present. Paragraph (3) requires the custodian to give the requester written notice of the reasons that more time is needed. Under both paragraphs (1) and (3), the custodian's failure to respond within the applicable time frame constitutes denial of the request.

Subdivision (f) in the current statute has been redesignated as subdivision (h) and two new subdivisions added. New subdivision (f) provides as follows:

> *(f) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information. Any reasonably segregable portion of a record shall be provided after deletion of the exempt information. The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where such deletion was made. If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, or obtain copies of public records, the custodian shall bear the cost of such separation.*

The first and second sentences state a principle commonly found in FOI laws[11] but missing from the Arkansas act, i.e., that a request may not be denied on the ground that a record contains exempt as well as nonexempt information. In the event of such commingling, any "reasonably segregable portion of a record shall be provided after deletion of the exempt information." An Arkansas Supreme Court decision suggests, without squarely holding, that this is the approach to be followed under the present law. *See Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). The redaction requirement applies regardless of the medium in which the record is maintained, and the custodian must, under the third sentence, indicate the amount of material that has been deleted and where the deletions have been made. The fourth sentence makes plain that any cost associated with the deletion process is to be borne by the custodian.

New subdivision (g) requires any entity subject to the FOIA to take the act's requirements into account when acquiring computer hardware or software. It provides:

> *(g) Any computer hardware or software acquired by an entity subject to Section 25-19-103 after July 1, 2001, shall permit full compliance with the requirements of this section and shall not impede public access to records in electronic form.*

This requirement is designed to facilitate access to electronic records. Similar provisions have been adopted by other states.[12] The date – July 1, 2001 – coincides with the commencement of the state's fiscal year.

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[11] *See, e.g.*, 5 U.S.C. § 552(b).

[12] *See, e.g.*, N.C. Stat. Ann. § 132-6.1(a).

SECTION 4.

This section of the bill adds a new code section, Ark. Code Ann. § 25-19-108, that contains the criminal penalty for negligent FOIA violations presently found in Section 25-19-104. No change has been made in the statutory language.

SECTION 5.

This section contains the standard codification clause.

SECTION 6.

This section contains the standard severability clause.

SECTION 7.

This section contains the standard repealer.

SECTION 8.

This section contains an emergency clause.

ATTORNEY GENERAL OF ARKANSAS
Mark Pryor

Opinion No. 99-134

July 14, 1999

The Honorable Sue Madison
State Representative
573 Rockcliff Road
Fayetteville, AR 72701-3809

Dear Representative Madison:

This is in response to your request for an opinion on the following questions concerning access to public records through a web site:

1. Does the FOIA require that the records on Washington County's web site be viewed free of charge?

2. Does the FOIA require that these records be included on the web site?

You state that Washington County has a web site which is accessed free of charge, but the assessor has elected to not include property records on the free site.

RESPONSE

Question 1: Does the FOIA require that the records on Washington County's web site be viewed free of charge?

The FOIA cannot, in my opinion, reasonably be construed to address any questions regarding permissible charges in connection with Internet access to public records. The FOIA was passed in 1967. Given the fact that this means of access to public records was nonexistent in 1967, it seems clear that the FOIA is silent on permissible related charges. I must therefore disagree with the suggestion in a previous Attorney General opinion that the FOIA may be

323 Center Street • Suite 200 • Little Rock, Arkansas 72201
(501) 682-2007 • FAX (501) 682-8084
Internet Website • http://www.ag.state.ar.us/

construed to apply to any fee that is imposed once an agency decides to put its information "on-line." Op. Att'y Gen. 97-115. It is my opinion that the FOIA simply does not reach this issue.

I am therefore unable to opine, as a general matter, on the legality of any charges for viewing public records on-line. The question of whether some other basis of authority currently exists for charges in this regard may require a case-by-case review, taking into account the particular records in question as well as the custodian thereof. See, e.g., A.C.A. § 21-6-401(d) (Repl. 1996) (authorizing a "reasonable fee," to be established by the Arkansas Supreme Court, for electronic access to court decisions and other court records.) It should be noted, however, that this undoubtedly is an issue that will be addressed by the Electronic Records Study Commission created under Act 1060 of 1999.

Question 2: Does the FOIA require that these records be included on the web site?

The answer to this question is, in my opinion, "no." I agree with the conclusion in Opinion 97-115 that the FOIA cannot reasonably be construed to require on-line access to computerized information.

Assistant Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

MARK PRYOR
Attorney General

MP:EAW/cyh

OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201

Thomas M. Carpenter
City Attorney

Telephone (501) 371-4527
Telecopier (501) 371-4675

September 16, 1999

Ms. Susan Cromwell
Chairman
Office of Information Technology
Dept. Of Information Systems
State of Arkansas
P.O. Box 3155
Little Rock, AR 72203

Via facsimile: 682-4310

Re: Meeting of the Electronic Records Study Commission on September 10, 1999

Dear Ms. Cromwell:

Thank you for inviting me to attend the meeting of the Electronic Records Study Commission created to review and make recommendations on updating laws on the release of public information in electronic format. This letter contains some of the remarks I made to the Commission and gives the background of SB 805.

SB 805 by Senator Argue was drafted by our office and supported by the Arkansas Municipal League. The Bill was revised several times prior to introduction after meetings and input from representatives of the Arkansas Press Association. The bill contains language from existing FOI statutes from Kentucky, Utah, Florida, and North Carolina. From our research, these appeared to contain the most modern language.

Little Rock has many requests for electronic data and is in dire need of a good law. The issue of release of electronic data requires a balancing of competing interests. These interests are stated in SB 805 in the legislative findings. We worked with the City's computer programmers to understand what their issues were and then researched existing states laws for good examples.

We determined to not amend the existing FOI act for several reasons, the predominant one being the perceived inability to actually accomplish our goal to pass a release of electronic data law that amended the FOIA.

A second reason involves the penalty contained in existing law. (Ark. Code Ann. § 25-19-104 -- negligent violation is a misdemeanor punishable by a fine or 30 days in jail or both.). Criminal penalties are a minority position nationwide. (Of 47 states reviewed, 16 had criminal penalties -- see attached research). SB 805 contained civil penalties from the North Carolina law which is similar to the existing Ark. Code Ann. § 25-19-107, but adds the element of bad faith on the part of the plaintiff and intentional misconduct on the part of the defendant. I recommend that this committee review the entire penalty section of the FOI and consider modernizing it to conform to the majority position nation wide.

Third, Cities want to be reimbursed for labor for nonstandard requests. We defined that in the bill. Fourth, we recommend that the committee review copyright issues, which we also addressed in the bill.

Finally, our favorite statute is North Carolina's. It was mentioned to us by a member of the Arkansas Press Association.

I hope you and the committee find this information helpful. Please let me know if I can be of further assistance.

Sincerely,

Thomas M. Carpenter
City Attorney

TMC/MSR

STATE OF ARKANSAS
ELECTRONIC RECORDS STUDY COMMISSION

P.O. BOX 3155
LITTLE ROCK - 72203
TELEPHONE: (501) 682-9990

INFORMATION SYSTEMS

MIKE HUCKABEE
Governor

SUSAN CROMWELL
Co-Chair
DOUG ELKINS
Co-Chair

MEMORANDUM

TO: Agencies and Interested Parties

FROM: Electronic Records Study Commission
Susan Cromwell, Co-Chair
Doug Elkins, Co-Chair

RE: Electronic Records Study Commission Principles

DATE: 7/20/2000

The Electronic Records Study Commission (ERSC) was created by the passage of Act 1060 of 1999. The Commission is mandated to serve in an advisory capacity and shall be responsible for studying public access to electronic or computerized records under the Arkansas Freedom of Information Act. The commission is tasked to develop recommendations for amendments to that Act for consideration by the 83rd General Assembly.

The ERSC has held monthly meetings since August of 1999 in which it has heard testimony from major groups who have expressed interest, issues, concerns regarding the impact of the "Arkansas Freedom of Information Act" (FOIA) on the management of electronic records by state and local governments and other entities subject to the FOIA. A list of members of the ERSC, as well as resource documents, minutes of each of the meetings, and drafts of recommendations documents can be viewed at http://www.dis.state.ar.us/bd_c/ersc/ersc_home.htm.

The ERSC will be submitting its report and recommendations for changes to the FOIA in December. As a foundation, members developed a document containing the bedrock principles for crafting the report and recommendations. Attached please find a copy of these Principles of the ERSC, along with a feedback response form. The commission is interested in being as inclusive as possible and would appreciate your suggestions, comments, or concerns regarding the Principles. **Please submit your responses, using the feedback form attached, by August 31, 2000.**

Thank you for your interest and participation.